In the case of *Holt v. Heatherfield Trust, Limited*[3], which is the latest relevant case I can find, the point is thus put by Atkinson, J. :—

"a judgment creditor stands only in the shoes of his debtor and can take only that which the debtor can honestly deal with at the time the order nisi is served. Thus, he is not in such a good position as an assignee, who may defeat an earlier assignee by getting his notice in first."

At this point I return to a consideration of the agreement of 5th May, 1949, between the present Debtor and the Lock Construction Company. By clause 6 of the agreement the Debtor undertook to hand over to the Lock Construction Company all payments made to him by the Public Works Department in pursuance of the contract. In view of what I have stated to be the law, I have to ask myself whether the Debtor could deal with these payments otherwise than by handing them over to the Lock Construction Company, either "honestly" in the word of Chitty, J., or "properly and without violation of the rights of other persons" in the words of Cotton, L.J., in the case of *Badeley v. Consolidated Bank*[4].

To that question there can, in my view, be one answer only. The debtor's intention to assign these payments to the Lock Construction Company is clear beyond doubt, and it is equally clear that whether they were to be so assigned as security for advances made or as monies to be dealt with as the property of a partnership constituted under the agreement of 5th May, 1949, there was ample valuable consideration for the undertaking to assign them. There can, moreover, be no question arising of notice of the assignment being given to the Public Works Department, for what is involved here is the priority of the assignment not in relation to a subsequent assignment of which notice has been given but in relation to an attachment of the debt which forms its subject matter by way of execution.

Having arrived at these results, I have no hesitation in saying that the debt in question was not one that could be attached by way of execution by the Respondent on 9th September, 1949. The appeal is therefore allowed with costs to the Appellant and it is ordered that the attachment be removed from the debt.

Appeal allowed.

KWONG SHIN KONGSI v. T. KADERBHOY.

[Court of Appeal (Willan, C.J., Pretheroe and Taylor, JJ.) December 19, 1949]

[K.L.—Civil Appeal No. 10 of 1949]

Landlord and Tenant—Control of Rent Ordinance, 1948, s. 10—Special case for opinion of High Court—Whether an appeal lies against such opinion.

In this case the Rent Assessment Board, Kuala Lumpur, stated a special case for the opinion of the High Court under s. 10 of the Control of Rent Ordinance, 1948, and the Judge of the High Court after hearing this special case remitted his opinion to the Board.

The appellants appealed against the said opinion and the respondent raised a preliminary objection that no appeal lies.

Held, that there is no right of appeal from the opinion of the High Court under s. 10 of the Control of Rent Ordinance, 1948.

Cases referred to :—

(1) *Ex parte The County Council of Kent and the Council of the Borough of Dover* (1891) 1 Q.B. 725.

(2) *In re Knight and Tabernacle Permanent Building Society* (1892) 2 Q.B. 613.

(3) *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board* (1893) 1 Q.B. 375 at p. 380.

CIVIL APPEAL.

B. J. P. Joaquim and *M. Edgar* for the Appellants.

W. G. W. Hastings for the Respondent.

Cur. Adv. Vult.

The judgment of the Court, with which Pretheroe and Taylor, JJ. agreed, was delivered by :—

Willan, C. J. :—Under section 10 of the Control of Rent Ordinance, 1948, (hereinafter in this judgment referred to as "the Ordinance") the Rent Assessment Board at Kuala Lumpur (hereinafter in this judgment referred to as "the Board") stated a special case for the opinion of the High Court.

In so far as they are relevant to this judgment, the facts are that the respondent is the tenant of a shop house, and the appellants, who occupy a portion of the shop house, claim that they are sub-tenants of that portion by virtue of an alleged assignment to them by a former sub-tenant.

The proceedings commenced before the Board on an application by the appellants for the rent to be fixed under section 8(3) of the Ordinance.

At the hearing of that application the Board, acting under section 10 of the Ordinance, reserved for the consideration of the High Court the following two questions :—

(a) whether there had been an assignment to the appellants, as pleaded, and

(b) if not, whether the appellants came within the expression "other persons interested" so as to be entitled to apply under section 8 (3) of the Ordinance.

In his opinion, which was remitted to the Board, the Judge of the High Court who heard and determined this special case, answered both those questions

in the negative. The finding that the appellants are not "persons interested" in effect put an end to the proceedings.

The appellants brought this apppeal against that opinion.

Mr. Hastings, for the respondent, raised a preliminary objection that no appeal lies, and this Court reserved judgment on that preliminary objection.

Sub-sections (1) and (2) of section 10 of the Control of Rent Ordinance, 1948, read :—

"10. (1) The Board may, at any stage of an application or proceeding before it, reserve for the consideration of the High Court any question of law arising in such application or proceeding, in the form of a special case which shall —

(a) be drawn up by the President and shall set out shortly the facts on which the law is to be applied and the question or questions of law to be determined;

(b) be sent up by the President to the Registrar of the Supreme Court;

(c) be set down for argument in such manner as the High Court directs.

(2) The High Court shall hear and determine the question or questions of law arising on such special case and shall thereupon remit the matter to the President with the opinion of the Court thereon and such opinion shall be binding on the Board."

It was pointed out that by sub-section (2) of that section the Court does not deliver any judgment, nor does it make any order — it merely gives an opinion which it sends to the Board. It is the Board, not the Court, which eventually makes the order (guided by the opinion of the Court in so doing) determining the matter between the parties before the Board.

From this Mr. Hastings argued that there could be no right of appeal because the Control of Rent Ordinance, 1948, itself contains no provision for such an appeal, and sub-section (1) of section 36 of the Courts Ordinance, 1948, which gives a general right of appeal from the High Court to the Court of Appeal in civil matters, provides for appeals to be brought only from judgments and orders. That sub-section reads :—

"The Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court in any civil matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to the provisions of this or any other written law regulating the terms and conditions upon which such appeals shall be brought."

In the case of *Ex parte The County Council of Kent and the Council of the Borough of Dover*[1] Lord Halsbury said, at pages 727 and 728 :—

"The only thing with which we have to deal is whether in the form in which the question now arises before us there is an appeal to this Court. We are of opinion that there is not. An appeal must be given, and is not to be presumed. We do not of course mean that it must be given in so many words. If the thing appealed from becomes a judgment or order, a decree or rule of the High Court, it would of course be appealable under section 19 of the Act of 1873, and perhaps something which may fill the character of a judgment or order, decree or rule, although not known by those names, may be subject to appeal as being practically within the words by which a right of appeal is given, although the words themselves be not used."

Therefore, in the absence of any provision for appeal in the Control of Rent Ordinance, 1948, itself, the question for decision is whether the opinion given by the High Court under section 10 of the Ordinance in this matter amounts to either a judgment or an order of the High Court. If it does, then a right of appeal is given by sub-section (1) of section 36 of the Courts Ordinance, 1948; if it does not, then there is no right of appeal.

Mr. Joaquim, with him Mr. Edgar, for the appellants, submitted that since the opinion of the High Court in this case is of such a nature that it effectively determined the matter between the parties before the Board, that opinion amounts to a judgment or order of the High Court and therefore an appeal lies to the Court of Appeal. He argued that there can be two types of opinions under section 10 of the Ordinance — those which are of such a nature that they finally determine the matter between the parties before the Board and therefore amount to judgments or orders of the Court; and those which are of such a nature that they do not finally determine the matter between the parties before the Board, in which case they do not amount to judgments or orders of the High Court and consequently are not appealable.

Mr. Hastings cited a number of English decided cases, including cases relating to references to the Court by an arbitrator under the Arbitration Act, 1889. He did this to show that a reference under section 10 of the Ordinance is consultative and that in England there is no appeal from a consultative reference. I need not refer to all the cases cited.

In the case of *In re Knight and Tabernacle Permanent Building Society*[2] a special case was stated to the Divisional Court by an arbitrator under section 19 of the Arbitration Act, 1889, which reads :—

"Any referee, arbitrator or umpire may at any stage of the proceedings under a reference, and shall if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

It was held in that case that no appeal lay from the opinion given by the Divisional Court. At pages 618 and 619 Lord Justice Bowen said :—

"The Arbitration Act, 1889, in order to assist arbitrators, has given power to an arbitrator to take the opinion of the Court in two ways. He may state his award in the form of a special case. When that is done, the arbitrator has exhausted his powers; he has made his award in such a shape that the opinion of the Court will determine the rights of the parties, and turn the award

into one groove or the other. Therefore the opinion of the Court is, in that case, an effective determination of the rights of the parties. I do not doubt that in such a case there might be an appeal from the decision of the Divisional Court upon a special case. But there is another way in which an arbitrator may, during the arbitration, take the opinion of the Court. Under section 19, he may voluntarily take, or by order of the Court or a judge he may be compelled to take, by means of a special case, the opinion of the Court for his guidance, and as a step for arriving at his own ultimate award in the matter. That is an interlocutory proceeding in the reference, and I do not think that it can have been intended that, whenever a case is stated under this section for the opinion of the Court, such opinion when taken is to be treated as an absolute determination of the rights of the parties with the result that there may be an appeal from it which may be carried to the House of Lords."

As appears from that passage of the judgment, under the Arbitration Act, 1889, there were two methods by which an arbitrator might take the opinion of the Court :—

(a) He might state his award in the form of a special case and when he does this, by making his award, he has exhausted his powers, and the opinion of the Court thereon effectively determines the rights of the parties and therefore there is an appeal against the Court's opinion.

(b) He might take the opinion of the Court as a step in arriving at his own ultimate award in the matter, and if that method is adopted there is no appeal against the opinion of the Court.

That there are these two methods, with the consequential results I have just set out, is put beyond doubt by the judgment of Lord Justice Bowen who said, in the case of *In re Kirkleatham Local Board and Stockton and Middlesborough Water Board*[3] :—

"I will read what I said in **In re Knight and Tabernacle Permanent Building Society** because I am certain that it expresses the opinion of the whole Court" (here Lord Justice Bowen read most of the passage I have set out above.)

"The truth is, that under the Common Law Procedure Act, 1854, section 5, a special case might be stated in the award, and it was held in a number of cases that an appeal lay from the decision of the Court upon it. In **In re Knight and Tabernacle Permanent Building Society** it was unsuccessfully attempted to bring the two classes together, and to apply the rule that there was an appeal, to a case where the arbitrator had **not** stated his award in the form of a special case, but asked the opinion of the Court by way of interlocutory proceeding in order to assist him to form his judgment."

It is interesting to note on reference to Hogg on the Law of Arbitration, 1936 edition, page 110, that sections 7(b) and 19 of the Arbitration Act, 1889, (these are the two sections by means of which an arbitrator refers matters to the Court) are repealed and replaced by section 9 of the Arbitration Act, 1934, which reads :—

"9. (1) An arbitrator or umpire may, and shall if so directed by the Court, state:—

(a) any question of law arising in the course of the reference; or

(b) An award or any part of an award;

in the form of a special case for the opinion of the Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the Court under this section shall be deemed to be a judgment of the Court within the meaning of section 29 of the Supreme Court of Judicature (Consolidation) Act, 1925" (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the Court) "but no appeal shall lie from the decision of the Court on any case stated under paragraph (a) of sub-section (1) of this section without the leave of the Court or of the Court of Appeal."

Thus it would appear that the legislature in England considered it advisable to state in express terms when an appeal should lie to the Court of Appeal in references from an arbitrator to the Divisional Court.

Coming back now to section 10 of the Control of Rent Ordinance, I have no doubt that a reference by the Board is analogous to a reference by an arbitrator by the second method mentioned earlier in this judgment, because the Board in making the reference does so for its own guidance and as a step in arriving at its own ultimate order in the matter before it.

Further, by the use of the word "opinion" in section 10 of the Ordinance, which is a popular and not a technical or legal term, the Legislature would appear to have intentionally used a word which would exclude the right of appeal.

As to this I refer again to the case of *Ex parte County Council of Kent and Council of Dover* (*supra*). At page 728 of the report of that case Lord Halsbury said :—

"We think the legislature must be taken to have been aware of the state of the law, as pronounced by the House of Lords in 1878; and if those who framed the Act of Parliament had intended that an appeal should lie, they would have either given it by express words, or taken care to use language, the importance of which had been pointed out ten years before in a decision of the House of Lords in the case to which we have referred. But the legislature has not done so. It has used a popular, and not a technical or legal, word; and we are of opinion that it must be taken to have intentionally used a word which would exclude the right of appeal."

I am fortified in the view I have taken by contrasting the wording of section 10 of the Ordinance with that of section 44 of the Federated Malay States Estate Duty Enactment, 1941, which reads :—

"44. (1) Where any doubt arises in point of law in respect of the payment of any estate duty the Collector may of his own motion or at the request of the executor or other accountable person state a case for the opinion of the Court and shall set forth the facts of the case and his own opinion thereon.

.....

(iii) The Court upon the hearing of any such case and after hearing the parties interested, if any appear, shall determine the issue of law and deliver its judgment thereon containing the grounds on which its decision is founded and shall remit to the Collector a copy of such judgment under the seal of the Court and the signature of the Registrar, and the Collector on receipt of such copy shall dispose of the case conformably to such judgment.

(iv) No appeal shall be allowed from any order, direction, determination or decision of the Court under reference under this section without the leave of the said Court or of the Court of Appeal.

....."

That section expressly states that on a reference by the Collector of Estate Duty the Court shall *deliver a judgment* and, as is the usual practice of the Court, the judgment shall be under the signature of the Registrar and the seal of the Court. There, the Legislature had deliberately used the word "judgment" and by so doing, subject to the restrictions mentioned in sub-section (iii) of the section, has given a right of appeal to the Court of Appeal by virtue of section 36(1) of the Courts Ordinance 1948.

Hence, contrasting the language used in section 44 of the Estate Duty Ordinance, 1941, with that used in section 10 of the Control of Rent Ordinance, 1948, I have no doubt that there is no right of appeal from an opinion of the Court under the latter section.

Accordingly, the preliminary objection succeeds, and I would dismiss this appeal with costs to the respondent.

Appeal dismissed.

TAN BOON TECK v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Laville, J.) December 11, 1949]

[Muar — Criminal Appeal No. 10 of 1949]

Trade and Customs Enactment, Johore, ss. 39 and 45 — Possession — Power of Appeal Court in disposing of appeal in case where one act constitutes several offences, and there has been acquittal on one charge and conviction on another and an appeal from such conviction — Criminal Procedure Code, s. 316(b)(ii).

The appellant in this case was charged with another accused man in the alternative (1) with knowingly being in possession of uncustomed tobacco or (2) with knowingly conveying uncustomed tobacco. On these alternative charges, the other accused pleaded guilty to possession and the Court accepted his plea and convicted and acquitted him on the other alternative charge. Appellant claimed trial on both alternative charges. He was convicted on the first charge and acquitted on the second charge. The Appellate Court found that the conviction on the first charge cannot stand and the question arose as to what order the Court should make. It was argued for the appellant that this Court cannot now reverse the acquittal on the second charge and put the accused therein in peril again by ordering a retrial or alter the finding of the lower Court by convicting him on the alternative charge.

Held, (1) that mere **juxta** position is not enough to constitute possession. There must be something more, a nexus that establishes in the accused a power of controlling the thing said to be possessed. (2) That an appeal is merely a continuation of trial, and throws open all the evidence to re-examination in order to determine whether or not the various findings of the trial Court are correct. In a case where an act, or series of acts, is of such a nature that it is doubtful which of several offences has been committed, an appeal from a conviction for any one of the offences must lay the whole case open to interference of the Appellate Court, notwithstanding any order of acquittal by the trial Court in regard to any other offences.

Cases referred to :—

(1) *Nawi bin Buyong v. Public Prosecutor* (1935) F.M.S.L.R. 222; (1936) M.L.J. 71.

(2) *Krishna Dhan Mandal v. Queen-Empress* I.L.R. 22 Cal. 377.

CRIMINAL APPEAL.

W. H. Sault for the Appellant.

D. B. W. Good for the Respondent.

Cur. Adv. Vult.

Laville, J. : — In this case appellant was charged with another accused man in the alternative with knowingly being in possession of uncustomed tobacco or with knowingly conveying uncustomed tobacco. On these alternative charges, the other accused pleaded guilty to possession and the Court accepted his plea and convicted and fined him $5,000 or 15 months R.I., and acquitted him on the other alternative charge.

Appellant claimed trial on both alternative charges.

In such charges the onus is laid by law on the accused to prove that the goods are duty paid (sec. 45, En. 80) or that he did not know they were uncustomed (sec. 39 (ii), En. 80). The prosecution must prove that accused was in possession of the goods. In sec. 39 (i), when the charge is one of possession, the word 'knowingly' is redundant. One of the ingredients of possession is knowledge of the nature of the thing possessed by the alleged possessor and knowledge that it is within his powers and opportunity of disposal either exclusive to himself or jointly with others.

From the evidence in this case it is clear that appellant must have known that the article was tobacco, but was it at his disposal either jointly with the other accused or exclusively? On this point the evidence is that the other accused was in the left hand front seat of the car, that the rear portion of the car behind the front seat was occupied by sacks of tobacco, and that two persons were in the car. The evidence is that appellant was arrested in the car and had a driver's badge in his pocket, and it is a reasonable and acceptable inference that he occupied the driving seat and drove